IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2381
[2020] NZHC 2639

BETWEEN	NORTHLAND REGIONAL COUNCIL Plaintiff
AND	HARKIRAT SINGH GILL First Defendant
	MAHER MOHAMMAD JAMMAL Second Defendant
	RESOURCES ENTERPRISES LIMITED Third Defendant

Hearing:	23 June 2020 Further submissions received dated 22 July 2020, 21 August 2020 and affidavit of Hemant Kumar Patel dated 3 August 2020
Counsel:	D T Broadmore and H C Snell for Plaintiff T J Cooley for First Defendant J W Turner for Second Defendant No appearance for Third Defendant
Judgment:	8 October 2020

JUDGMENT OF WHATA J

This judgment was delivered by me on 8 October 2020 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:	Buddle Findlay, Auckland Brookfields, Auckland Michael Dineen Law, Auckland

[1] On 14 February 2015, the Northland Regional Council ("Council") entered into a term loan facility agreement ("Term Loan") to advance $750,000 to Resources Enterprises Limited ("REL"). Mr Gill and Mr Jammal ("Guarantors") provided personal guarantees and indemnities in respect of that advance. On 20 February 2015, the Council, REL and the ASB Bank Limited ("ASB") also executed a deed of priority affording ASB priority to the sum of $2.5m plus interest and all costs ("Deed of Priority"). In March 2015, the Council made the loan advance. In April 2019, REL defaulted on the loan repayments. Demands for payment have gone unanswered.

[2] This is a summary judgment application for the sum said to be owning by REL, and the Guarantors under the Term Loan ($860,580.41). REL does not defend the claim, but the Guarantors contend (in short) that:

(a) the Deed of Priority materially altered their rights of subrogation by affording ASB priority in respect of a higher sum ($2.5m) than the ASB debt ($2.1m) as at the date of the Deed; and

(b) they did not receive independent advice at the time of execution.

[3] The Council maintains that the Guarantors have no arguable defence because they both clearly contracted to provide the guarantees and indemnities irrespective of the Deed of Priority. The Council also says that the Guarantors did receive independent advice, but are still liable, even if they did not.

[4] I agree with the Council.

Background

Term loan

[5] On or about 14 February 2015, the Council, REL and the Guarantors (signing as directors of REL and as guarantors) executed the Term Loan, dated 14 February 2015. Under this agreement, the Council agreed to make available to the company a loan of $750,000.

[6] The Term Loan was secured by way of a guarantee and indemnity from the Guarantors and a second ranking general security agreement (behind the ASB) in relation to, among other things, all present and after-acquired personal property of the company. The debt to the ASB at the time is defined by the Term Loan as indebtedness of up to $2,100,000.

Guarantee and indemnity

[7] Clause 11 of the Term Loan provides for a guarantee and indemnity in the following terms:

> **11. GUARANTEE AND INDEMNITY**
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> 11.1 **Guarantee:** Each Guarantor jointly and severally unconditionally and irrevocably guarantees to the Lender the due and punctual payment of the Guaranteed Indebtedness as and when it becomes due and payable under the Transaction Documents (whether on the normal due date, on acceleration or otherwise) and the due and punctual observance and performance of and compliance with the Guaranteed Obligations.
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> 11.2 **Indemnity:** As a separate and additional liability under this Agreement, the Guarantor jointly and severally unconditionally and irrevocably indemnifies the Lender against:
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> (a) **Guaranteed Indebtedness:** any Guaranteed Indebtedness (or any amount which, if recoverable, would have formed part of the Guaranteed Indebtedness) not being recoverable or recovered from the Guarantors under the guarantee given in clause 11.1; or
>
> (b) **Guaranteed Obligations:** any Guaranteed Obligations being unenforceable or not being duly satisfied or performed under the guarantee given in clause 11.1.
>
> This clause shall apply to any of the Guaranteed Indebtedness (or any amount which, if recoverable, would have formed part of the Guaranteed Indebtedness) which is not or may not be recoverable or recovered for any reason, and to any Guaranteed Obligations which are not or may not be enforceable for any reason, (whether or not within the Lender's knowledge) including any legal or equitable limitation, disability or incapacity of or affecting the Borrower, any other Obligor or any other person, any transaction relating to such moneys or obligations being or becoming at any time void, voidable, defective or otherwise unenforceable and any other circumstances which allow the Borrower or any Guarantor to avoid paying such amounts, in whole or in part. Each Guarantor undertakes to pay to the

Lender the amount or amounts certified by the Lender as being required to so indemnify it immediately on demand.

11.3 **Payment:** If, for any reason, the Borrower does not pay all or any part of the Guaranteed Indebtedness to the Lender on or before the due date for payment, each Guarantor shall pay the Guaranteed Indebtedness to the Lender on demand (whether or not demand for payment has been made on the Borrower or any other person).

11.4 **Principal Debtor:** Each Guarantor's liability to the Lender under this Guarantee and Indemnity is deemed to be the liability of a principal debtor and not merely a surety.

11.5 **Unconditional Obligations:** No Guarantor's liability will be affected or diminished, nor will any security interest or guarantee provided by any Guarantor be released or discharged, by any act, indulgence, omission or thing which but for this clause 11.5 would have affected or diminished that Guarantor's liability or operated to release or discharge any such security interest or guarantee, or would have otherwise provided a defence to that Guarantor (in each case, in whole or in part, and whether or not known to, or done or omitted to be done by, that Guarantor or the Lender or any other person) including:

…

(e) **Other Agreements:** any other person providing or joining in providing any Transaction Document or other agreement, guarantee or security interest or the failure by any Obligor or any other person to provide, or being incompetent to give, any Transaction Document or any other agreement, guarantee or security interest required by the Lender;

(f) **Other Obligations:** any Transaction Document or any other agreement, guarantee, security interest or right held by or available to the Lender, at any time being or becoming in whole or in part void, voidable, defective or unenforceable for any reason or being released, discharged or varied in whole or in part;

(g) **Variation:** any amendment, variation, waiver, compounding, compromise, release, abandonment, relinquishment or renewal (whether or not having the effect of increasing the liability of the Guarantor or any other person) of any Transaction Document, or any other agreement, guarantee, security interest or property, or of any of the rights of the Lender against any Obligor or any other person ("change in circumstance"), or any failure to notify any Obligor or such person of such change in circumstance;

Security – Deed of Priority

[8] "Security" includes the documents listed in Schedule 5, namely:

1. Second-ranking and general security agreement (behind the Bank only) from the Borrower in favour of the Lender.

2. Deed of Priority between the Lender and the Bank, recording the Bank's priority of $2,500,000.

[9] Clause 3.1 of the Term Loan provides that:

> 3.1 **Condition Precedent:** The Facility is not available unless and until the Lender [the Council] has confirmed to the Borrower [REL] in writing that it has received, in form and substance satisfactory to it, all of the documents and evidence listed in Schedule 3.

[10] Schedule 3 includes "Transaction Documents", which are defined to include "the Security" (as defined above).

[11] A Deed of Priority signed by the Guarantors as directors of REL was sent to the Council's solicitors on 5 February 2015. A copy of that Deed of Priority, dated 20 February 2015, as registered states:

Collateral	All present and after-acquired personal property owned by the Debtor being all the personal property in respect of which a security interest is granted by the Debtor under both the First Security Agreement and the Second Security Agreement (whether or not the First Security Agreement or the Second Security Agreement also extends to other property) and including and extending to proceeds. A reference to Collateral includes any part of it.
First Secured Party Amount	$2,500,000.00 plus interest and all costs

First Security Agreement	The security agreement dated 16/10/14 given by the Debtor, under which a security interest is granted over the Collateral in favour of the First Secured Party (whether or not it also extends to any other property).
Interest Period	24 months
Second Secured Party Amount	$750,000.00
Second Security Agreement	The security agreement dated 14/02/2015 given by the Debtor, under which a security interest is granted over the Collateral in favour of the Second Secured Party (whether or not it also extends to any other property).

[12] It will be seen that the Deed of Priority refers to "$2,500,000 plus interests and costs" whereas the Security refers only to "$2,500,000".

Loan and Default

[13] In March 2015, REL drew down $750,000 under the Term Loan. It began defaulting in early 2019 and as at 20 August 2019, there was $860,580.41 outstanding.

The evidence

[14] Malcolm Charles Nicolson, Chief Executive Officer of the Council, provided an affidavit of evidence. He affirms the matters pleaded in the statement of claim. He also provided an affidavit in reply, addressed below.

[15] Mr Jammal has provided two affidavits. In the first affidavit, he says that the Council wanted to invest in the sawmill as it was an employment generator. He says that the Council initially sought an equity investment but ultimately demanded that the transaction be concluded by way of loan. He says the failure to repay the loan was a consequence of a severe and unexpected downturn in relation to the sawmill's business.

[16] In his second affidavit, Mr Jammal identifies the sawmill as the main asset of REL. He said it was valued at about $2m at the time it was developed. Prior to the loan to the Council, he says REL owed about $1.5m to ASB. He claims that prior to the Deed of Priority, he and Mr Gill had a right of subrogation against the net assets of REL. The effect of this, he has been advised, is that if REL defaulted in their obligations to the Council, the guarantors would have a right worth about $500,000 (that is, the difference between ASB's debt and the value of the sawmill).

[17] He then says that, once the Deed of Priority had been entered into, ASB was granted a priority of up to $2.5m. He says that the borrowings from ASB increased at the time to a figure exceeding $2m. The effect of the Deed of Priority therefore was to reduce the value of any subrogated claim to zero. He also says that, when he signed the Deed, he did not understand that he would be materially disadvantaged. He says the Deed of Priority did not provide for his written consent and he never gave his verbal consent.

[18] Mr Gill provided an affidavit to the same effect.

[19] In reply, Mr Nicolson says that the Deed of Priority was tabled as part of the security for the Term Loan and that the Council received three executed documents (copies of the Term Loan, GSA and Deed of Priority) from REL and the Guarantors at the same time on the 28 January 2015. Mr Nicolson provided a further affidavit. In that affidavit, he refers to the Personal Property Securities Register, which includes a notation referring to the ASB security of 31 October 2014. He also refers to a Deed of Covenant, wherein the ASB has assigned to Mr Jammal its interests under the Deed of Priority.

Independent advice

[20] During the hearing, the Guarantors claimed that their signatures were not properly witnessed. An affidavit was then obtained from the solicitor acting for them at the time of execution of the Term Loan, Mr Hemant Kumar Patel, a partner of Patel Nand Legal. Mr Patel "strongly denies" the Guarantors' claim that he did not advise them on the nature and extent of their liabilities as guarantors. He also provides a detailed explanation of the process by which he witnessed the execution. Given the

issues raised by the Guarantors about the execution process, and their claim that they were not properly advised, it is worth noting the following:

(a) On 22 January 2015, Patel Nand (Mr Prasad), one of the solicitors handling the day-to-day file management under Mr Patel's supervision, advised Mr Gill that the documents, including the Term Loan, were acceptable for execution.

(b) On 27 or 28 January 2015, Mr Patel witnessed Mr Gill sign the Term Loan as guarantor. The Term Loan had also been signed by Mr Jammal, but Mr Patel refused to witness that signature as he had not been present when Mr Jammal signed it.

(c) At that time, Mr Patel did not sign the witness attestation because he knew that Mr Jammal would need his signature witnessed when he returned from overseas.

(d) After this visit, Mr Prasad sent the signed documents to the Council. On 29 January 2015, the Council's solicitor sent Mr Prasad an email advising that the execution of the Term Loan as a deed by the Guarantors should be witnessed.

(e) On or after 29 January 2015, Mr Jammal signed the Term Loan in Mr Patel's presence, who then completed the attestation section in respect both signatures.

(f) On 5 February 2015, Mr Prasad sent the signed Term Loan Facility Agreement, General Security Agreement and Deed of Priority.

[21] It is now accepted by the Guarantors that their signatures were in fact attested by Mr Patel as a witness to their signatures and that this occurred prior to the execution of the Deed of Priority (dated 20 February 2015). But both maintain that Mr Patel did not properly advise them of their liabilities.

Summary Jurisdiction

[22] As stated by the Court of Appeal in *Krukziener v Hanover Finance Limited*:[1]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

Issues

[23] A guarantee may be discharged where a material variation to the terms of a loan affects a guarantor's rights of subrogation to the security.[2] Mr Turner (supported by Mr Cooley) for the Guarantors contends this basic principle is engaged here on the basis that the Deed of Priority materially affected their rights of subrogation to the security, namely, the sawmill. He notes that the final priority sum could have exceeded $3m, likely expunging any value in the subrogated rights. He also contends that the Term Loan must be construed strictly, and if so, cl 11 does not contract-out their equitable rights. It was also contended that the Term Loan was not properly executed as a Deed, however, since it is now accepted that the execution of the Term Loan was in fact properly witnessed, that argument does not require further consideration. Finally, the Guarantors claim that they were not independently advised of the implications of the Deed of Priority.

[24] Mr Broadmore for the Council responds, in summary, that the Guarantors contracted out of their ability to rely on this principle. The Council further submits that, in any event, there was no material variation and therefore the Deed of Priority

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1 *Krukziener v Hanover Finance Limited* [2008] NZCA 187, [2010] NZAR 307 at [26].

2 James O'Donovan and John Phillips *The Modern Contract of Guarantee* (3rded, LBC Information Services, Sydney, 1996) at 400.

did not materially affect the Guarantors' subrogated rights. I say little more about Mr Broadmore's submissions because they have largely found their ways into my reasons.

Assessment

[25] Whether a surety's right to treat a guarantee as discharged has been effectively excluded "is purely a matter of construction."[3] Here, the guarantors' obligations under the Term Loan are unequivocal. The Guarantors agreed to punctually pay and/or indemnify the Council against the "Guaranteed Indebtedness", that is, all of the indebtedness of REL in relation to the Council.[4] Per cl 11.4, they also agreed that their liability "is deemed to be the liability of a principal debtor".[5] They also agreed that the Deed of Priority was a condition precedent,[6] and that no liability "will be affected or diminished" by any variation to any Transaction Document, including the Deed of Priority.[7]

[26] In *Orme v De Boyette*, a clause stipulating that "the Covenantor shall be deemed to be a principal debtor and liable on all covenants in the mortgage" was held to preclude the covenantor's release, even though the priority of the mortgage had been varied.[8] The Court in *Pogoni v R & W H Symington & Co (New Zealand) Ltd* reached the same conclusion when dealing with a clause stipulating, "as between the covenantors and the lender the covenantors shall be deemed to be principal debtors and liable on all covenants in the said debenture".[9] I can find no material difference between the clauses in these cases and cl 11.4. This longstanding line of authority therefore appears to provide a complete answer to the proposed defence based on the change to the ASB priority.

[27] It is necessary, however, to address three cases mentioned by Mr Turner which stand for the principle that clauses purporting to preclude release of liability have been construed strictly – *Bosher v Allied Liquor Merchants Ltd*,[10] *Dunlop New Zealand Ltd*

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3 *Pogoni v R & W H Symington & Co (New Zealand) Ltd* [1991] 1 NZLR 82 (CA) at 86.
4 Clause 11.1 and 11.2.
5 Clause 11.4.
6 Clause 3.1
7 Clause 11.5.
8 *Orme v De Boyette* [1981] 1 NZLR 576 (CA) at 577.
9 *Pogoni v R & W H Symington & Co (New Zealand) Ltd*, above n 3 at 83.
10 *Bosher v Allied Liquor Merchants Ltd* HC Auckland AP 69-SW01, 11 September 2001.

v Dumbleton,[11] *Nelson Fisheries Ltd v Boese*.[12] Although the principle is not disputed, I have found these cases of little assistance to the Guarantors. In *Bosher,* the Court refused to construe a clause purporting to make a guarantor a principal debtor in relation to the supply of goods, because properly construed, the clause related only to an advance.[13] The clause in *Bosher* was not like the present clause, where assumption of liability as debtor was clearly confined to the granting of credit, not the supply of goods.

[28] In *Dunlop*, the Court held that a variation of contract between the plaintiff and the company, made sometime after the guarantee and without the guarantor's consent, discharged her liability as surety under the instrument of guarantee and did not give rise to a right to have it discharged which could have been waived by her.[14] The relevant clause in that case stated:[15]

> 9. In order to give full effect to the provision of this guarantee we hereby declare that you shall be at liberty to act as though we were the principal debtors and we hereby waive all and any of our rights as sureties (legal equitable statutory or otherwise) which may at any time be inconsistent with any of the above provisions.

[29] It is difficult to reconcile the outcome in *Dunlop* with *Orme* and *Pogoni*. But, in any event, unlike the present case, in *Dunlop* there was a major change to the underlying business to which the guarantee related. Wilson J noted that, without the knowledge and consent of the defendant, the plaintiff "agreed upon the severe curtailment of the company's business and entered into a new stocklist agreement".[16]

[30] In *Nelson Fisheries,* the Court affirmed the principle that a 'debtor' clause must be construed strictly, and that a guarantor could not be liable in respect of an assignment he did not consent to.[17] This was a clear case of the Court not extending liability for a subsequent material event not consented to by the guarantor. Relevantly, the Court noted:[18]

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11 *Dunlop New Zealand Ltd v Dumbleton* [1968] NZLR 1092 (SC).
12 *Nelson Fisheries Ltd v Boese* [1975] 2 NZLR 233 (SC).
13 At [16].
14 At 1097.
15 At 1094.
16 At 1096.
17 At 238.
18 At 235.

> [the guarantor] cannot be held liable as a principal when, without his agreement or even knowledge, a substantial departure has been made from the contractual terms of that deed. The covenant does not provide, as it might have done, that the defendant shall not be released by any variation in the provisions of the deed or by any agreement relating thereto between its parties.

[31] Here, there can be no credible claim that the Guarantors did not consent or know about the Deed of Priority. They both signed it.

[32] The last sentence also usefully leads to my next point. A substantial variation of the basis of a loan agreement between a creditor and debtor without the consent of the guarantor will discharge the guarantor from liability. However, as noted by Duffy J in *RD1 Limited v McKinnon*:[19]

> where a guarantee contains a clause which gives the creditor power to make variations to the contract with the debtor, this principle will not apply: see *Pogoni v R & W H Symington & Co (NZ) Ltd* [1991] 1 NZLR 82 (CA). As was recognised in *Pogoni* at [85], the question is one of construction of the guarantee to determine whether the guarantor's right to treat the guarantee as discharged has been effectively excluded.

[33] The Term Loan expressly provides that variations to the obligations will not affect the guarantee. It is helpful to repeat the relevant cl 11.5(g) here:

> 11.5 **Unconditional Obligations:** No Guarantor's liability will be affected or diminished, nor will any security interest or guarantee provided by any Guarantor be released or discharged, by any act, indulgence, omission or thing which but for this clause 11.5 would have affected or diminished that Guarantor's liability or operated to release or discharge any such security interest or guarantee, or would have otherwise provided a defence to that Guarantor (in each case, in whole or in part, and whether or not known to, or done or omitted to be done by, that Guarantor or the Lender or any other person) including:
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> …..
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> (g) **Variation:** any amendment, variation, waiver, compounding, compromise, release, abandonment, relinquishment or renewal (whether or not having the effect of increasing the liability of the Guarantor or any other person) of any Transaction Document, or any other agreement, guarantee, security interest or property, or of any of the rights of the Lender against any Obligor or any other person ("change in circumstance"), or any failure to notify any Obligor or such person of such change in circumstance;

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[19] *RD1 Limited v McKinnon* HC Auckland CIV-2011-404-003499, 4 November 2011 at [28].

[34] Therefore, assuming that the Deed of Priority amounted to a variation, the Guarantors' liability was plainly unaffected. However, I also accept Mr Broadmore's contention that the Deed of Priority did not in fact vary the obligations under the Term Loan. Rather, the execution of the Deed of Priority was a condition precedent of the Term Loan and formed part of the "Security" under the loan. Subject to the addition of the words "plus interest and costs", the execution per se of the Deed of Priority was not a variation of the Term Loan.

[35] Regarding the additional words "interests and costs", cl 11.5(f) is plainly engaged, which also preserves liability notwithstanding any variation to a Transaction document, including the Deed of Priority. This also dispenses with Mr Turner's curious argument that cl 11 is not engaged because it was the execution of the Deed of Priority per se that altered the position and that cl 11 only addresses variations of any Transaction document. The addition of "interest and costs" being a variation to the quantum provided for in Schedule 5 is expressly subject to cl 11.5(g).

[36] Mr Turner further argued that the Deed of Priority was not in fact a "Transaction document" because the quantum of the priority was changed. This argument is not reconcilable with the incontrovertible fact that the Guarantors signed the Deed of Priority on the basis that it was such a document.

[37] Given the foregoing, I am satisfied that, whatever the effect on the Guarantors' subrogation rights, the clear terms of Term Loan preclude discharge of their liability. For completeness, however, I briefly turn to examine the merits of the claimed effect on their rights of subrogation.

Rights of subrogation

[38] Mr Turner maintains that the Guarantors' guarantee must be discharged because the Guarantors never consented to the Deed of Priority and the Deed of Priority materially impaired their rights of subrogation. He further contends that the impact should be measured by a counterfactual involving what level of priority might have been negotiated with ASB. I see no merit in either claim. The Guarantors signed the Deed of Priority, which was sent to the Council's solicitors on 5 February 2015, together with the Term Loan. As I have noted, the Guarantors cannot maintain with

any credibility that they were not aware of it and did not consent to it. Furthermore, it is pure speculation to suggest that ASB might have agreed to a lower priority sum. Indeed, it is not credible to suggest it would have so agreed, given the escalating indebtedness of the company.

Independent advice

[39] The final refuge for the Guarantors is the contention that they were never advised of the implications of the Deed of Priority. That claim is denied by their then-lawyer, Mr Patel. In any event, as the Court of Appeal stated in *Austin v Southland Building Society*:[20]

> [17] As to the independent advice aspect, lack of independent advice cannot in itself render the guarantee invalid. Rather, lack of independent advice is generally raised in the context of determining whether a party's consent was obtained through undue influence or unconscionable bargain, which is not alleged here.

[40] As in *Austin*, there is no suggestion of undue influence or unconscionable bargain, or the presence of any factor that might demand closer scrutiny as to the advice given. On the contrary, the Guarantors were not third party guarantors removed from the detail of the transactions. They were the directors of REL who sought the loan. I therefore dismiss this last point as meritless.

Outcome

[41] The application for summary judgment is granted in the sum of $860,580.41, together with interest from 20 August 2019. The defendants have no defence to the claim. I have not heard the parties on the issue of costs on the application. My current view is that costs should be awarded on a solicitor/client basis, as expressly provided for in the Term Loan. If necessary, the parties may file submissions, no longer than three pages in length, within five working days on the issue of costs.

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[20] *Austin v Southland Building Society* [2012] NZCA 337 at [17].